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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TOMAS VILLA ZAVALA, Defendant and Appellant.	G040207 (Super. Ct. No. RIF131949) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Jeffrey Prevost, Judge. Remanded for resentencing. Affirmed in all other respects.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Tomas Villa Zavala was beaten up in a fistfight. The man who hit him got into a truck with two other men, and they began to drive away. Defendant responded by removing a sawed-off shotgun from his car, and shooting at the truck. Defendant was convicted of, inter alia, three counts of assault with a firearm, and one count of discharging a firearm in a grossly negligent manner.

Defendant argues the assault convictions must be reversed because the jury was instructed with an erroneous instruction. CALCRIM No. 875, with which the jury was instructed, accurately states the law, as set forth in *People v. Williams* (2001) 26 Cal.4th 779. We must therefore reject defendant's argument.

Defendant argues, and the Attorney General concedes, the trial court erred in imposing consecutive sentences for the personal firearm use enhancements attendant to two of the assault charges.

Finally, defendant argues the trial court erred by imposing a concurrent sentence on the firearm discharge count. We agree. Defendant had the same intent and objective in committing the assault as in discharging the firearm. Therefore, the commission of these crimes was part of one act or indivisible course of conduct, and the sentence on the firearm discharge count should have been stayed. (Pen. Code, § 654.)

We remand for resentencing on the personal firearm use enhancements, and on the count of discharging a firearm in a grossly negligent manner. In all other respects, the judgment is affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Prosecution Case

About 5:00 p.m. on July 28, 2006, defendant got into a fistfight with a man in front of the El Cerrito Market in Corona. Two other men, who were with the man with

whom defendant was fighting, broke up the fight, and those three men walked together toward the parking lot. At the same time, defendant walked to his car, which was parked in the same lot. Defendant pulled a sawed-off shotgun from the backseat or trunk of his car. He ran toward the truck the other men had gotten into, and pointed the gun at it. The truck drove away in a hurry; the driver did not try to run over defendant. Defendant ran through the parking lot toward the street, and fired one shot at the truck as it drove away. Witnesses saw defendant point the shotgun at the truck, not up in the air.

Defendant got into his own car and drove in the opposite direction from the truck. He pulled into a dirt parking lot, got out of his car, and approached four men in the lot. Defendant "high-fived" the men, and one man handed him a beer. Defendant removed the shotgun from the backseat of his car and showed it to the men. He got back in his car, and drove away.

Defendant was stopped by a deputy sheriff soon thereafter. A search of defendant's car revealed a loaded sawed-off shotgun on the floor of the backseat, and methamphetamine in the center console. A witness identified defendant as the shooter during a field showup.

Defense Case

On the day of the shooting, defendant received a shotgun from a man who owed him money but could not pay him. Defendant then went to the El Cerrito Market to cash his paycheck. A man approached defendant in front of the market and demanded money. Defendant refused, and the two began to argue. The man lunged at defendant with a beer bottle when defendant tried to get in his own car. The man then began to punch defendant, and two other men approached and started hitting defendant as well. The men stopped hitting defendant when someone yelled at them.

Before they left, the men told defendant they would come back because he had to pay them, they knew where he worked, and they knew where to find him. The men got into a truck. As defendant walked toward the market, the driver put the truck in reverse, and defendant thought the driver was trying to run him over. Defendant then ran back to his car, and took out the shotgun. He ran toward the sidewalk as the truck pulled into the street, and fired the shotgun over the truck in an attempt to scare the men or to detain them until the police arrived. Although defendant initially intended to go into the market and call the police, he got in his car and left.

Defendant saw his work foreman as he was driving home, so he stopped to say hello. After drinking a few sips of a beer the foreman provided him, defendant got back in his car to drive home. Defendant cooperated with the police after being stopped.

Defendant claimed the car he was driving when he was arrested was jointly owned with three other friends. Defendant claimed he had only used methamphetamine once, one year and seven months before the day of the shooting in this case, and had never used it since.

Procedural History

Defendant was charged in an amended information with three counts of attempted murder (Pen. Code, §§ 187, subd. (a), 664 [counts 1, 2, & 3]); three counts of assault with a firearm (*id.*, § 245, subd. (a)(2) [counts 4, 5, & 6]); discharge of a firearm at an occupied vehicle (*id.*, § 246 [count 7]); possession of a short-barreled shotgun (*id.*, § 12020, subd. (a)(1) [count 8]); possession of methamphetamine while armed with a loaded firearm (Health & Saf. Code, § 11370.1 [count 9]); and possession of methamphetamine (*id.*, § 11377, subd. (a) [count 10]). The information alleged, among other things, that defendant personally used a firearm within the meaning of Penal Code sections 12022.5, subdivision (a) and 1192.7, subdivision (c)(8), in connection with counts 4, 5, and 6.

A jury acquitted defendant of counts 1, 2, and 3. On count 7, the jury found defendant not guilty of discharge of a firearm at an occupied vehicle, but found him guilty of the lesser included offense of discharging a firearm in a grossly negligent manner. (Pen. Code, § 246.3.) The jury convicted defendant of all other charges, and found true the enhancement allegations of defendant's personal firearm use in connection with counts 4, 5, and 6. The trial court later dismissed count 10 as a lesser included offense of count 9.

The trial court sentenced defendant to a total prison term of 10 years. Defendant was sentenced to the midterm of three years on count 4, plus the midterm of four years on the personal use of a firearm enhancement attendant to that count. Defendant was also sentenced to one-year terms on counts 5 and 6, which were imposed to run concurrently, and to one-year terms for the personal firearm use enhancements for those counts, to run consecutively. The court also sentenced defendant to two-year terms on counts 7 and 8, to be served concurrently, and to a term of one year on count 9, to run consecutively.

DISCUSSION

I.

DID THE TRIAL COURT ERR BY INSTRUCTING THE JURY WITH CALCRIM NO. 875?

Defendant argues the trial court erred by instructing the jury with CALCRIM No. 875. He claims that instruction improperly allowed the jury to convict him if it found he acted negligently, rather than requiring it to find he intended to assault the victims and apply force.

The Attorney General initially argues any error was invited, because defendant's trial counsel requested that CALCRIM No. 875 be given to the jury, and he did not object when the trial court proposed certain technical modifications to the form

instruction. Without deciding whether defendant invited any error, we proceed to the merits of the issue to forestall an inevitable claim of ineffective assistance of counsel.

The jury was instructed with CALCRIM No. 875 as follows: "The defendant is charged in Counts 4, 5, and 6 with assault with a firearm. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] First, the defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person; [¶] Secondly, the defendant did that act willfully; [¶] Thirdly, when the defendant acted, he was aware of facts that would lead a reasonable person to realize . . . that his act by its nature would directly and probably result in the application of force to someone; [¶] Fourthly, when the defendant acted, he had the present ability to apply force with a firearm; [¶] AND [¶] Lastly, that the defendant did not act in self-defense. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intends to break the law, hurt someone else, or gain any advantage. [¶] The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. [¶] The touching can be done indirectly by causing an object to touch another person. [¶] The People are not required to prove the defendant actually touched someone. [¶] The People are not required to prove the defendant actually intended to use force against someone when he acted. [¶] No one needs to have actually been injured by defendant's act. But if someone was injured, you may consider that fact, along with all of the other evidence, in deciding whether the defendant committed an assault, and if so, what kind of assault it was. [¶] A firearm is any device designed to be used as a weapon from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion."

Assault with a deadly weapon is a general intent crime. (*People v. Rocha* (1971) 3 Cal.3d 893, 898-899.) In *People v. Williams, supra,* 26 Cal.4th at pages 788-789, our Supreme Court confirmed that a conviction for assault with a firearm may not be based on a defendant's negligent or reckless conduct. The court held that "assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id.* at p. 790.) Finally, the court held, "a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*Id.* at p. 788.)

Defendant argues the Supreme Court in *People v. Williams* erroneously adopted a negligence standard as the mental state necessary to convict for assault with a firearm.[1] Defendant relies on the Third District Court of Appeal's opinion in *People v. Wright* (2002) 100 Cal.App.4th 703. In that case, the appellate court, while acknowledging it was bound by Supreme Court precedent, sharply criticized *People v. Williams* for adopting a negligence standard in assault cases. (*People v. Wright, supra,* 100 Cal.App.4th at pp. 705-706.)

CALCRIM No. 875, with which the jury was instructed, is in accord with the Supreme Court's holding in *People v. Williams*. We find no error.

[1] Defendant concedes this court is bound by Supreme Court precedent (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and raises this issue to preserve his right to file a petition for review with the California Supreme Court, asking it to reconsider its decision in *People v. Williams, supra,* 26 Cal.4th 779.

II.

SENTENCE ENHANCEMENTS MUST BE IMPOSED CONCURRENTLY, RATHER THAN CONSECUTIVELY.

Defendant argues the trial court imposed an unauthorized sentence by imposing consecutive one-year terms for the personal firearm use enhancements on counts 5 and 6, when the sentences on the substantive crimes for counts 5 and 6 were imposed concurrently. The Attorney General concedes this issue.

We agree that the trial court erred in imposing consecutive sentences for the enhancements attendant to counts 5 and 6. Personal firearm use enhancements are not separate crimes and do not stand alone; they are dependent on and necessarily attach to the underlying felony. (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311.) Imposing a concurrent term for a felony conviction and a consecutive term for its attendant enhancement results in an unauthorized sentence. (*Ibid.*) The proper procedure on appeal is to remand for resentencing. (*Ibid.*)

III.

THE SENTENCE ON COUNT 7 SHOULD HAVE BEEN STAYED, RATHER THAN IMPOSED CONCURRENTLY.

Defendant argues the trial court should have stayed imposition of his sentence on count 7 for discharging a firearm in a grossly negligent manner, rather than imposing a concurrent sentence for that offense. Defendant argues the discharge of the firearm was part of an indivisible course of conduct with, and had the same single objective as, assault with a firearm.

Penal Code section 654 prohibits multiple punishments for multiple crimes that arise from one act or one indivisible course of conduct. Whether the course of conduct is divisible depends on the actor's intent and objective. "If all of the offenses were incident to one objective, the defendant may be punished for any one of such

offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) The Attorney General argues the assault with a firearm and the discharge of a firearm were two separate acts, which occurred at different times, between which defendant had an opportunity to reflect. The Attorney General asserts: "The assault occurred as soon as appellant pointed the shotgun at [the] truck as it was in the parking lot. . . . The [discharge of the firearm][2] then occurred when appellant ran out of the parking lot, stopped on the sidewalk, pointed the shotgun at the truck, formed an intent to shoot, and began firing." We disagree. The testimony presented at trial shows that the acts of pointing the shotgun at the truck, running after the truck, then firing the shotgun were a part of one indivisible course of conduct that cannot be parsed more finely.

The Attorney General also argues defendant had different objectives in committing the different crimes, based on defendant's testimony that he shot at the truck because he was scared, he wanted the men who attacked him to leave, and he wanted to detain the men until the police arrived. The evidence does not support a finding that defendant had one of these objectives when committing the assault, and a different objective when discharging the firearm. The trial court should have stayed imposition of the sentence on count 7, pursuant to Penal Code section 654, and we remand for resentencing.

DISPOSITION

We remand for resentencing on the personal firearm use enhancements, and on the count of discharging a firearm in a grossly negligent manner. The trial court is directed to prepare an amended abstract of judgment imposing concurrent terms for the Penal Code section 12022.5 enhancements, and to stay imposition of defendant's sentence on count 7. The trial court is further directed to forward a certified copy of the

[2] The respondent's brief actually reads, "[t]he *assault* then occurred." (Italics added.) Given the Attorney General's argument, this is obviously a typographical error.

amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, ACTING P. J.

ARONSON, J.